United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7341

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

ARISTEDES A. DAY, THEODORA DAY and CONSTANTINE DAY, individually and ARISTEDES A. DAY and THEODORA DAY as parents of CONSTANTINE DAY,

Plaintiffs-Appellees,

- against -

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant.

BRIEF FOR PLAINTIFFS-APPELLEES

MAILMAN & VOLIN, P.C.
Attorneys for Plaintiffs-Appellees
1290 Avenue of the Americas
New York, New York 10019
(212) 541-6400

NICOLAS LIAKAS
Of Counsel

(8726)

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Preliminary Statement of the Case

The appellant herein ("TWA") appeals from the decision and order of the Honorable Charles L. Brieant, Jr., United States District Judge for the Southern District of New York, which granted appellees' (hereinafter referred to as "Plaintiffs") motion for summary judgment on the issue of liability (A108-129).* In his decision and by his order, Judge Brieant held TWA absolutely liable for injuries

*Numbers preceded by the letter "A" refer to pages in the Appendix.

sustained by the plaintiffs while they were in the process of embarking upon TWA's aircraft at the Hellinikon Airport, Athens, Greece, on August 5, 1973. The lower Court's decision was based on the application of the provisions of the Warsaw Convention, ("Convention" or "Treaty") a multi-national treaty to which the United States is a signatory, as modified by the Montreal Agreement.

Statement of Facts

On August 5, 1973, the plaintiffs were fare-paying passengers about to board TWA Flight 881 scheduled for a direct flight from Athens, Greece to New York, New York. Said flight was scheduled to depart from Athens at approximately 1530 hours, local time. Sufficiently in advance thereof, plaintiffs duly reported to the Athens airport. They presented their tickets to agents of TWA who processed and approved same for boarding said flight. The plaintiffs then successfully completed and proceeded past customs, passport and baggage inspections. They were permitted entrance to an area reserved exclusively for departing international passengers. Only ticket-holding passengers for international flights and authorized personnel were afforded access to this restricted area, and once they entered, such passengers could not exit therefrom without surrendering their tickets and passenger status. Seats were

assigned to the plaintiffs by TWA agents, boarding passes were issued, and their baggage was checked through to New York. Pursuant to appellant's regular procedures, its ground personnel took custody and control of plaintiffs in order to assist them in boarding and in their special seating arrangements, physically leading plaintiffs by their arms (A57-73).

Concurrently or shortly thereafter, Flight 881 was announced as boarding. At approximately 1500 hours, the plaintiffs were about to leave the passenger embarkation area when the procession of passengers boarding said flight was subjected to the detonation of explosives which were ignited or caused to be ignited by individuals proclaiming themselves to be members of a Palestinian liberation group, said individuals being apparently motivated by political reasons. While in the process of boarding said flight, the plaintiffs Aristedes A. Day and Constantine A. Day sustained personal injuries as a result of said detonation of explosives (A60). It is important to note that several other passengers had, just prior to this incident, exited from this area and had boarded vehicles for transport to the aircraft (A62-64), but that the plaintiffs had not done so solely due to their place on line (A60).

Proceedings Below

The action below was commenced on or about September 25, 1973. An amended complaint (A7-12) was filed and served on or about October 5, 1973, and issue was joined on or about October 15, 1973 by the filing and service of TWA's answer (A13-15).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the plaintiffs moved for summary judgment on the issue of liability only, on the ground that there was no triable issue of fact regarding liability in that the Montreal Agreement, engrafted upon the Warsaw Convention, imposed absolute liability upon the appellant irrespective of whether the defendant was wholly free of negligence and did not cause the damages sustained by plaintiffs. Oral argument was heard below on December 17, 1974. In his memorandum decision dated March 31, 1975, Judge Brieant granted plaintiff's motion in all respects and denied TWA's cross-motion for summary judgment. The order dated April 16, 1975 stayed further proceedings in this case pending the determination of this interlocutory appeal.

Summary of Argument

The Court below correctly held that the plaintiffs' were injured in the course of any of the operations of

embarking upon TWA's aircraft for an international flight, and that as a result thereof, TWA is absolutely liable for the plaintiffs' injuries.

Argument

I

TWA IS ABSOLUTELY LIABLE FOR PLAINTIFFS' INJURIES BECAUSE THEY WERE SUSTAINED IN THE COURSE OF EMBARKATION

Plaintiffs were passengers of TWA's international flight 881, and they were injured while they were in the process of embarking upon said flight. Absolute liability on the part of signatory carriers for injuries sustained by passengers in the course of embarkation results from a combination of a 1934 treaty (the Warsaw Convention) and a 1966 contract (the Montreal Agreement) formally approved by the Civil Aeronautics Board.

In 1934, the United States became a party to this Treaty, technically known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air. 49 Stat. 3000; Treaty Series No. 876.*

*For a brief but apt description of the Treaty, see Grey v. American Airlines, Inc., 227 F. 2d 282 (2d Cir., 1955), cert. denied 350 U.S. 989 (1956).

Warsaw's Article 1 provides:

> "(1) This Convention shall apply to all international transportation of persons ... performed by aircraft for hire ..."
>
> "(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination ... are situated ... within the territories of Two High Contracting Parties ..."

In the instant case, there is no dispute that the subject flight was "international transportation" within the meaning of the Treaty. Thus, the Warsaw Convention is applicable to the subject flight.

Article 17 of the Treaty states:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger, or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (Emphasis added.)

The affidavit of plaintiff Aristedes A. Day (A57-61) clearly shows that he sustained personal injuries and other damages while in the process of embarking upon the aircraft. The plaintiffs, pursuant to instructions issued by TWA, reported to the Hellinikon Airport sufficiently in advance of the estimated time of departure and commenced the necessary

and required procedures for boarding the subject flight. They presented their tickets to appellant's agents who accepted same and made the necessary seating assignments, and boarding passes were issued. Plaintiffs' baggage was checked through to New York and was taken by agents of TWA for loading aboard the plane. All passport, customs and currency inspections and controls were duly conducted and concluded. Plaintiffs were then permitted to enter an area reserved exclusively for departing international passengers. Appellant's ground personnel directed the plaintiffs to the proper and designated departure gate which was reserved for passengers for TWA flight 881 to New York. At appellant's direction, mechanical devices and the public address system announced the boarding of flight 881 at Gate 4. Plaintiffs assumed their position on the line of TWA passengers for said flight which was proceeding through a check-point for a search of their persons for concealed weapons. At such time, plaintiffs were being physically led, by the arm, by the passenger relations agent for TWA. Just prior to plaintiffs' exit from this area, the terrorist attack began.

The Warsaw Convention, before effectuation of the Montreal Agreement, imposed liability on the air carrier in international transportation for the damages sustained by a passenger up to a maximum of $8,300, unless the carrier proved that it was completely free of fault in which event

it would not be liable for any damages. But in 1966, and as a result of intense dissatisfaction with the inadequate damage limitation of $8,300, many of the world's air carriers, including appellant, entered into a formal agreement, now known as the Montreal Agreement, which was incorporated in each carrier's formal tariff and then approved by the respective governments, including the United States acting through its Civil Aeronautics Board. CAB Order No. E-23680, May 5, 1966, approving Agreement CAB 18900 relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Docket 17325. Briefly stated, appellant waived the limitation in Warsaw Article 22 up to $75,000 for each passenger, waived any defense it might have under Article 20(1) of the Warsaw Convention, and, therefore, accepted liability irrespective of whether or not the airline was negligent, provided that the transportation was international under Warsaw and the ticket listed a place in the United States. See CAB Agreement 18900 signed by appellant and filed May 10, 1966. See also CAB Press Releases 66-61 and 67-161, respectively dated May 13, 1966 and November 29, 1967. In sum, by waiving the Article 20(1) defense, Trans World Airlines accepted the absolute liability imposed on it by Article 17.*

*For the history leading up to and the reasons for the Montreal Agreement, see Comment, The Warsaw Convention - Recent Developments and the Withdrawal of the United States Denunciation, 32 Journal of Air Law and Commerce 243 (1966); Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harvard Law Review 497 (1967).

Perhaps the clearest statement of the implications of the absolute liability regime of the Montreal Agreement comes from the authors of that Agreement. In 1969, a sub-committee of the legal committee of the International Civil Aviation Organization (ICAO) met in Montreal to consider some of the legal questions involved in a proposed revision of the Warsaw Convention. Special consideration was given to the subject of absolute liability since, in the words of the sub-committee, it constituted one of the major elements of the Montreal Agreement. A paper entitled "Note on System of Absolute Liability," was presented. ICAO Doc. 8839-LC/158-2, 33 (1969). In commenting on absolute liability under the Montreal Agreement (IATA Agreement), the sub-committee stated:

> "The scope and effects of application of the IATA Agreement in different situations appear to be as follows:
>
> * * * *
>
> (f) In the case where a passenger was killed or injured by the willful act of a third party. Then, under the IATA Agreement, the carrier shall be absolutely liable with regard to all claims for death or injury of passengers except a claim brought by the wrong-doer; whereas, under the Warsaw Convention he would not be liable if he discharged the burden of proof under Article 20, paragraph 1.
>
> * * * *

(h) In the case of an accident resulting from an act of God, vis major, inevitable accident or like circumstances where it was impossible for the carrier to avoid the damage, he would not be liable under the Warsaw Convention; but he would be liable according to the IATA Agreement.

(l) Including, it seems, where a passenger died from natural causes, it being merely a coincidence that he happened to be on board the aircraft at that time. ICAO Doc. 8839-LC/158-2, at 37-38."

It was, therefore, abundantly clear to its drafters that the Montreal Agreement imposed liability upon the carriers for damages caused under the circumstances completely beyond their control, such as sabotage and hi-jacking. See also Husserl v. Swiss Air Transport Co., 351 F.Supp. 702 (S.D.N.Y., 1972) aff'd 485 F.2d 1240 (2d Cir. 1973).

It is thus demonstrable that the Warsaw-Montreal regime imposes strict or absolute liability upon Trans World Airlines in the instant case, irrespective of whether or not it was negligent or at fault, because the plaintiffs sustained their injuries while they were embarking upon appellant's aircraft.

II

THE COURT BELOW DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFFS

The sole issue in this case is the proper meaning to be attributed to the liability provisions which read "... in the course of any of the operations of embarking ..." Being an international treaty, the convention is the supreme law of the land (U.S. Const., Art. VI, Cl.2). The meaning and the intent of the terms of the convention were properly determined and applied by Judge Brieant, as a matter of law. See Herman v. Trans World Airlines, Inc., 34 N.Y. 2d 385 (1974).

Summary judgment in several other Warsaw-Montreal cases has been granted, in state and federal courts. In the first decided case, the Honorable Samuel H. Rosenberg, one of the Justices of the New York Supreme Court, County of New York, held in Millikin Trust Co. v. Iberia Lineas Aereas de Espana, S.A., New York Law Journal November 21, 1969, p. 14, col. 8 (Special Term, Part 1 Supreme Court, New York County, Index Number 17495/1968), aff'd 36 A.D. 2d 582 (1st Dept. January 26, 1971), that the plaintiff was entitled to summary judgment on the issue of liability on the second cause of action based upon the Montreal Agreement for damages up to the amount of $75,000. In that case,

the plaintiff alleged other causes of action seeking recovery in excess of the damage limitation, but said causes of action are irrelevant to the issue at bar. The relevant second cause of action was based upon the Montreal Agreement and sought recovery for $75,000 without alleging any negligence on the part of the airline. The only showing was that the plane crashed. No reason for the crash was shown. The New York Supreme Court's grant of summary judgment on the issue of liability on said cause of action was affirmed by the Appellate Division, First Department.

The Honorable Irving L. Levey, one of the Justices of the New York State Supreme Court, County of New York, in McDivitt v. Pan American World Airways, Inc., New York Law Journal, June 2, 1970, p. 2, col. 5 (Special Term, Part I, Supreme Court, New York County) granted the plaintiff summary judgment in an opinion which states, in part:

> "Moreover, the Montreal Interim Agreement to which defendant carrier is a party, specifically provides for absolute liability up to $75,000 for each passenger's death or injury. The defendant carrier may not avail itself of any defense under Article 20(1) of the Warsaw Convention which has been waived under the aforesaid Montreal Agreement, and was not pleaded herein."

Further, the Honorable Margaret M. Mangan, Justice, in McCarthy v. Trans World Airlines, Inc., New York Law Journal, August 3, 1970, p. 8, col. 3 (Special Term, Part I,

Supreme Court, New York County, Index Number 9793/1970), granted summary judgment to the plaintiff. Although the opinion does not specify, said motion was based upon the same Warsaw Treaty-Montreal Agreement regime as advanced in the case at bar. The motion papers specifically state that the plaintiff was injured while on the runway in the course of abandoning the aircraft preceding a flight between New York and various other countries; that the flight was governed by the Warsaw Convention and Montreal Agreement; and that the defendant was absolutely liable for damages up to $75,000, thereby entitling the plaintiff to partial summary judgment which the Court subsequently granted.

Finally, the Court in Salmon v. Pan American World Airlines, Inc., New York Law Journal, February 1, 1971, p. 2, col. 4 (Special Term, Part I, Supreme Court, New York County, Index No. 00969/1970), granted summary judgment to the plaintiffs. In that case, plaintiffs were passengers aboard the Pan American World Airways Boeing 747 that was hijacked to and sabotaged at Cairo, Egypt on September 6, 1970. The motion papers specifically stated that the plaintiffs were injured while they were outside the plane after explosive charges were lit and before the plane exploded; that the flight was governed by the Warsaw Convention and Montreal Agreement; and that the defendant was absolutely liable for damages up to $75,000. As previously stated, the plaintiffs

were granted the identical relief prayed for in the instant case, summary judgment on the issue of liability.

In each of these cases, there was no proof or suggestion of fault or negligence; summary judgment was granted on liability as a matter of law.

As previously stated, the sole issue raised in this appeal is whether the "accident" complained of herein "took place ... in the course of any of the operations of embarking ..." as contemplated by Article 17. [Emphasis added].

The appellant concedes that the above quoted phrase of Article 17 is the accurate translation from the official French version, "... ou au cours de toutes opérations d'embarquement et de débarquement." As a consequence, "...the court's inquiry should proceed toward determining the ordinary meaning of those terms and arriving at a reasonable interpretation which will effecutate the treaty's purposes." Herman v. Trans World Airlines, supra, at 393; McDonald v. Air Canada, 439 F. 2d 1402 (1st Cir., 1971).

To determine the ordinary meaning of "in the course of any of the operations of embarking," we turn to Webster's New International Dictionary, Second Edition. "Course" is stated to be of French derivation meaning the act of moving from one point to another, a series of motions or acts arranged in order, a succession of acts; customary

or established sequence of events; orderly progress or procedure. [Emphasis added.] "Operation" is defined as an act or process; an action done as a part of practical work or involving practical application of a principle or process. Also derived from the French, "embarking" is defined as to cause to go on board a vessel or boat; the act or process of embarking. The Court below quite properly referred to lexicon sources to ascertain the plain and ordinary meaning of the words used (A115), and correctly concluded that these plaintiffs were in the process of embarking when they were injured.

But Judge Brieant did not reach his decision solely on this basis; he specifically and carefully reviewed and considered "the diplomatic and legislative history of [the] treaty to determine its correct interpretation." (A118-119).

Contrary to the statements on page 14 of appellant's brief, the Convention does not state and plaintiffs did not below and do not herein contend that an airline's duty under the Convention commences once a prospective passenger enters the airport or even the terminal building itself. It should be noted though that

the drafters of the Convention seriously considered imposing liability upon the airlines from the moment a prospective passenger entered the airport's limits. See excerpts of the minutes of the Convention annexed hereto as Exhibit "A". Though this was rejected, the Convention did not opt to state that liability attaches only when the passenger is on board the aircraft. By selecting the phrase "any operations of embarking," the intent of the Convention is to impose liability sometime after entry within the airport's limits but before the actual boarding of the plane. Nonetheless, in this particular case, under the totality of the facts presented, coupled with the definitions above quoted and the case law on carrier liability referred to above, one must conclude that the incident complained of occurred during the course of embarking. The plaintiffs had their tickets clipped and their seats assigned to them, their passports were approved and their baggage checked through to their destination, their flight was announced as boarding, they were under the personal and direct control of the defendant's ground personnel and its passenger relations agent, who was physically leading them, had taken their position on line to embark and had commenced to exit from the terminal when the explosives were detonated. It is respectfully submitted that in view of all the facts so presented, under the

totality of the circumstances, the court below correctly concluded that the plaintiffs had commenced to embark and that they were injured while in the midst of the operations of embarking.

Appellant urges this Court to adopt the position that only accidents occurring on board the aircraft are covered by the Convention (appellant's brief, Point I). On page 19 of its brief, appellant states that "no authority found has ever suggested that Article 17 could ever apply to an accident occurring inside the terminal building." Appellant's position and statement are in serious error.

To begin with, several domestic courts have held international airlines liable under Article 17 of the Warsaw Convention for injuries sustained by passengers while they were outside and removed from the aircraft and its ladders or approaches. Salmon, supra; McCarthy, supra. Moreover, appellant erroneously states the holding of the Courts in McDonald, supra, and in Felismina v. Trans World Airlines, (A89a, 89b). In neither case did the courts hold or imply that the Convention did not apply to passengers within the terminal building. Instead, each looked at the totality of the circumstances present therein. Indeed, the McDonald court flatly stated that one remains in the status of an international passenger after disembarking and inside the terminal building, and further stated that only when such

a passenger reaches a "safe point" well inside the terminal does the Convention cease to apply. That Court did not define what constitutes a "safe point" or where it begins; rather, it simply held that Mrs. McDonald, under the totality of the circumstances present in that case, had passed beyond such a "safe point." And in Felismina, the Court simply concluded "that by the time plaintiff boarded the down escalator she had disembarked from defendant's aircraft." It did not state nor did it imply in its decision that airline liability under the convention does not apply inside a terminal building (A89b).

A further amplification of the facts and decision in McDonald & Felismina will clearly establish that the Court below followed the same reasoning with due regard to the legislative history of the treaty and reached a sustainable conclusion compelled by the totality of the facts and law present. McDonald involved a passenger who had exited from all areas reserved solely for ticket holding passengers, cleared customs, walked through the common areas of the terminal, went down the stairs to a lower level and was waiting for her baggage when she tripped over another piece of luggage, thus injuring herself. The Court there, using the normal, every day meaning of "disembarking," concluded that Mrs. McDonald was beyond any of the operations of disembarking. Most importantly, the Court reached this

conclusion because Mrs. McDonald "was not going anywhere" and "she [was] not proceeding across the floor" when the accident occurred. 439 F.2d at 1405. Similarly, Ms. Felismina left the aircraft, entered areas which were open to the general public, walked through the long approach ramps present at the TWA terminal at New York's Kennedy Airport, continued across the upper floor of the terminal building, boarded a down escalator leading to the terminal's baggage claim area where she was pushed and injured her right knee.

It is crystal clear that neither McDonald or Felismina have any effect on the instant case. Plaintiffs herein were only a proverbial "thin line," just a step away, from actual boarding of the aircraft. The plaintiffs in McDonald and Felismina were understandably well beyond such a "thin line," well beyond a "safe point" within the terminal, and had effectively completed most of the requirements for disembarking, thus removing them from the Convention's application. And the facts in Klein v. KLM Royal Dutch Airlines, 46 A.D. 2d 679, 360 N.Y.S. 2d 60 (2d Dept., 1974), also cited by appellant in support of its theory, are almost identical to McDonald.

In addition, the common law relative to the common carrier and its passengers provides additional support to the plaintiffs on this issue.

It has been consistently held that a duty of care is

imposed upon the carrier toward a prospective passenger once the person of the passenger is somehow placed in some substantial sense in the custody of the carrier, either in the carrier's premises while waiting to take passage or upon his vehicle. See, McMahon v. Surface Transport Corporation of New York, 272 App. Div. 202, 69 N.Y.S. 2d 859 (1st Dept., 1947). And insofar as New York law is concerned, it is well settled that public carriers owe a duty to prospective passengers, as well as passengers, to provide a safe place for entering the vehicle. See Sheridan v. City of New York, 6 N.Y. 2d 765 (1959), Keener v. Tilton, 283 N.Y. 454 (1940).

To a reasonable man, the facts as established compel the conclusion that the plaintiffs herein were indeed well into the course of the operation of embarking when they were injured.

III

EXTRINSIC EVIDENCE OF INTENTION CANNOT BE ACCEPTED IN CONTRADICTION OF THE LITERAL AND NATURAL INTERPRETATION OF THE TREATY

Appellant consumes no less than twenty pages of its brief (22-42) in an unpersuasive attempt to convince this Court that comments and critiques by observers and non-observers to the Convention have the weight of statutory law.

Comments and critiques by those present at a treaty convention form no part of that treaty since they were not

mutually agreed to by the full treaty-making powers of the contracting states and are thus merely extrinsic evidence. This is especially true in this case where the United States did not participate in the Convention. Such extrinsic evidence of intention cannot be accepted in contradiction of the literal and natural interpretation of the treaty's language. McDonald, supra; Herman, supra; Crandall, Treaties: Their Making and Enforcement, 21 Columbia University Studies in History, Economics and Public Law 1, 226-27 (1904).

Words contained in a treaty are to be interpreted according to their ordinary meaning, and they should be interpreted with a view to give efficacy to the treaty. To be considered in reaching an interpretation of a treaty consistent with such an approach is the degree of civilization a contracting party has attained and the present, practical aspects of the contemplated interpretation. Jones v. Meehan, 175 U.S. 1 (1899); McDonald, supra; Herman, supra; Phillimore, Commentaries Upon International Law, (2d ed.), vol. ii, p. 101.

Judge Brieant's decision more than adequately satisfies every rule of treaty interpretation. And contrary to appellant's contention that the court below did not even consider the legislative history of the Convention (pp. 35-36 of TWA brief), reference is made to Judge Brieant's opinion, in which he unequivocally stated that the legislative

and diplomatic history was indeed considered, pursuant to and in accordance with which he devoted two pages of the opinion (A118-120). Moreover, Judge Brieant correctly interpreted the treaty under contemporary standards, needs and requirements of international air travel. One need not strain his mental capacities to understand, realize and admit that the TWA terminal building at New York's Kennedy Airport today is larger and more expansive than an entire airport, including runways, was at the time of the Convention. Obviously, the operations of embarking upon a flight in 1929, the year the Convention was adopted, were significantly simpler and less time consuming than today's requirements.

Incredibly, appellant advances as a theory of international uniformity the "act of state" doctrine as expressed in United States v. Belmont, 301 U.S. 324 (1937) (p. 41 TWA brief). Belmont concerned the validity of Soviet Russia's decrees and expropriations immediately after the Bolshevik Revolution and prior to this country's recognition of the Soviet government in the late 1930's. Not wishing to become embroiled in political issues, the Court stated, at 328, that "[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the Courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations'." The case is totally inapposite to appellant's position.

Furthermore, the interpretation of a treaty rendered by one contracting party is not binding on another. Throughout its history the United States has interpreted treaty provisions in accordance with its internal requirements taking into consideration the needs and requirements of American citizens and their government. And to do this, advisory opinions have been sought by the executive branch of our government from the legislative branch which has issued opinions via resolutions, on how a treaty provision is to be interpreted, which in turn have been complied with by the executive branch. See Crandall, supra, pages 222-3.

Appellant urges upon this Court yet another theory as to when an international passenger is in the course of embarking. This theory would have this Court believe that where a passenger is physically located at the time he is injured is determinative rather than looking at what prerequisite procedures he had completed by that time. This "last breath" theory is ludicrous. It is inconsequential on whose or what real estate an injured passenger was standing. Each international airport and indeed each international air carrier, has different rules, regulations and requirements for embarking and departing which are promulgated and enforced to satisfy the particular needs of that airport or airline. To fix a "location" test is to ignore and disregard reality and the "practical exigencies of [modern]

air travel in these parlous times." (A117). Truly determinative is the "totality of circumstances" test; that is, what steps had the passenger completed prior to, and what was he doing at, the time he was injured. This latter approach is the only logical and workable solution, and is the one relied upon by the Court below.

The decision below was based on sound principles of law. The record clearly sustains the decision. Thus, an affirmance is mandated. Jaffke v. Dunhan, 352 U.S. 280 (1957); Lum Wan v. Esperdy, 321 F. 2d 123 (2d Cir., 1963).

Conclusion

The decision and order below should be affirmed in all respects.

Respectfully submitted,

MAILMAN & VOLIN, P.C.
Attorneys for
Plaintiffs-Appellees

Nicolas Liakas

Of Counsel

E X H I B I T "A"

IV SESSION

October 7, Morning

The session was opened at 10:00 o'clock under the presidency of Mr. Lutostanski.

THE PRESIDENT. - Gentlemen, the session is open.

The order of the day for our discussions calls up the sophisticated question of the scope of the application of liability (Ruberic II).

On this question, we have straightway under the letter a) amendments from Germany, Italy, Great Britain, Brazil, Hungary, Switzerland and the USSR on the definition of the period of transport (Article 20, lst line).

I give the floor to the Reporter.

MR. DE VOS (Reporter). I should point out, first of all, that the indication of a German amendment on this question is an error.

I would also point out that the Swiss delegation has withdrawn its amendment; I am particularly happy with that and I would only wish that this example would be followed as much as possible.

So far as pertains to the amendments which remain, the most important is that of the British

delegation which is confined, for the most part, to the Hungarian amendment and consists, principally, in providing for the case of the forced landing.

Elsewhere, the British delegation has deemed that it would be better to define the period of transportation, not by the indication "beginning and end of this transportation," but by defining the period of transport itself.

The proposition of the USSR, like that of Brazil, consists, particularly for cargo, in starting the period of transportation at the moment when the cargo is actually received by the carrier or delivered by the shipper to the forwarder.

I would suggest taking the British proposition first, which is the most important. If it is acceptable, it will allow us at the same time to satisfy the Hungarian delegation.

SIR ALFRED DENNIS - (Great Britain) - We have proposed an amendment to article 20 which seems to us to be a simple matter of wording, but the question is so important that the preparatory committee considered it as a question of principle concerning the scope of the application of the convention.

Article 20, as it is presently worded, in its

First line, sets out:

> "The period of the transportation for the purposes of the present chapter, shall extend from the moment when the passengers, cargo or baggage enter the airport of departure until the moment when they leave the airport of destination. It does not cover any transportation whatsoever outside the limits of an airport other than by airplane."

In our opinion, this does not cover all the cases the convention intends to cover; this text envisions only the case of a trip from an airport of departure to an airport of arrival, like from Croydon to Bourget, but there are other cases. For example,

there is the case of combined transportation by railroad, sea and air which is developing more and more. We have foreseen in the first article that these combined transports could exist inasmuch as in the last line of that first article we said:

> "In the case of combined transportation, effected in part by air and in part by any other means of transportation, the provisions ofthe convention shall apply only to those parts of the transportation carried on by air, if they fall under the conditions of line 2."

Now, as long as a combined transport begins by rail, continues by air, then by rail and perhaps again by air and by sea, the expressions "the airport

of eparture and the airport of destination" are not perhaps the most appropriate.

Elsewhere, there is the case of a transfer, of a pause during transportation. I imagine a traveler who, during the course of a transfer, has a two-hour stopover; he takes advantage of it to look around town. Is he under the protection of the convention? Evidently not.

It's for this reason that, in the first part of our amendment, we propose to state that the scope of the application of the convention is limited uniquely by the nature of the transportation to be covered, and we offer the following wording:

> "The period of aerial transportation, for the application of the present convention, includes all periods of time during which passengers, cargo or baggage are , during the course of international transportation, on board an aircraft or within the limits of an airport, provided, however, that in the case of a grounding outside of an airport, the period of arial transportation shall not be deemed interrupted until, in the case of passengers, the moment when they leave the immediate vicinity of the place of landing, and, in the case of cargo and baggage, the moment when their transport is turned over to a means of transportation other than aircraft.
>
> "The period of aerial transportation shall not be deemed to include any means of transportation outside the limits of an airport other than by aircraft."

In the first part of this amendment, we preserve the principle that the convention applies within the limits of the airport, and we base this

amendment on that principle. Certain delegations would prefer that the convention would apply only after embarkation on the aircraft, but this principle was rejected by CITEJA. CITEJA concluded that presence in an airport conferred the application of the convention to passengers and cargo. It is on this principle that we have drawn our amendment.

The second part of our amendment refers primarily to forced landings outside an airport. In that case, obviously, if the aircraft crashes, there would be no question posed; but if the aircraft lands without crashing, the question arises as to whether passengers who debark and wait in a field outside the aircraft, or cargo which is taken off the aircraft and placed in the field, are still covered by the convention. It's a question which has not been provided for in article 20 as it is now drawn, and it is for that reason that we have proposed the last part of the amendment which I have just read.

MR. GIANNINI - (Italy) - Mr. President, Gentlemen. Mention has been made here of an amendment proposed by the Italian delegation. In fact, it's really not an amendment, but only a suggestion to improve the formula presented by CITEJA.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARISTEDES A. DAY, etal.,

Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC.,

Defendnat-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 310 W. 146th St., New York, N. Y.

That on the 16th *day of* September *1975 at* 30 Rockefeller Plaza, N.Y., N.Y.

deponent served the annexed Appellee Brief *upon*

Chadbourne Parke Whiteside & Wolff

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

James Steele

Print name beneath signature

JAMES A. STEELE

Sworn to before me, this 16th *day of* September *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977